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September 15, 2014

Via email only to:
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Michigan Senate Judiciary Committee Chairman, Senator Rick Jones
Michigan Senate Judiciary Committee Members
Senator Tonya Schuitmaker
Senator Steven Bieda
Senator Tory Rocca
State Capital
Lansing, MI 48909

Re: Senate Bill 981
Senate Judiciary hearing date: September 16, 2014 @ 2:30 P.M.

Dear Chairman Jones and Committee Members Schuitmaker, Bieda and Rocca:

Please excuse this third and final letter regarding this matter, however, I feel it critical that you have this April 5, 2012 letter from Chief Justice Robert P. Young Jr to Janet K. Walsh, Executive Director of the State Bar of Michigan, relative to ADM 2010-22, a less restrictive prohibition that contained in the pending Senate Bill 981(this letter from Chief Justice Young Jr. was only first received by me from the State Bar within the hour). Chief Justice Young states in detail the opinion of the Supreme Court that the proposal before the Court would likely not pass constitutional muster. Chief Justice Young concludes:

> To protect against potential challenges that might be raised if the Court adopted the proposed amendment, the Court invites the Bar to

conduct a study to gather empirical evidence in support of the proposed amendment. Upon completion of such a study, the Court will be happy to consider adoption of the proposed amendment. (See attached April 5, 2012 letter from Chief Justice Young Jr. to Janet K. Welch Executive Director of the State Bar of Michigan).

To my knowledge no such studies have been conducted or completed and there has been no empirical evidence to form the basis for this proposed legislation. Given the foregoing and Chief Justices opinion for the Court that that proposed rule (and this more restrictive legislation) is likely unconstitutional, it is my hope that this committee will vote no on this proposed bill and not pass it out of committee.

I look forward to addressing the committee tomorrow. Please make this letter and attachment part of the public record and should you have any questions, please feel free to contact me.

Very truly yours,

Merrill Gordon

MG/mmh

Enclosure

cc: Ms. Sandra McCormick, smccormick@senate.michigan.gov
Ms. Renee Edmondson, redmondson@house.mi.gov
Ms. Catherine McClure, cmcclure@senate.michigan.gov
Mr. Scott Bean, sbean@senate.michigan.gov
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Michigan Supreme Court

ROBERT P. YOUNG, JR.
CHIEF JUSTICE

MICHIGAN HALL OF JUSTICE
925 WEST OTTAWA STREET
LANSING, MICHIGAN 48913
313-972-3250

April 5, 2012

Janet K. Welch
Executive Director
State Bar of Michigan
306 Townsend Street
Michael Franck Building
Lansing, MI 48933-2012

RE: ADM File No. 2010-22

Dear Janet:

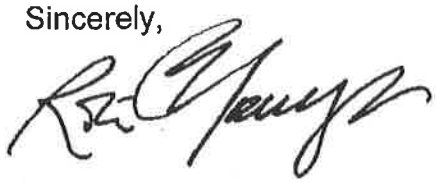
After the administrative public hearing held March 28, 2012, the Supreme Court considered the proposal that was submitted by the State Bar of Michigan's Representative Assembly in Administrative File No. 2010-22. As you are aware, the United States Supreme Court has held that although attorneys have a right to send truthful and nondeceptive communications to potential clients (under *Shapero v Ky Bar Ass'n,* 486 US 466 [1988]), a state may restrict that right under *Florida v Went For It,* 515 US 618 (1995), if the regulation meets the three-part test outlined in *Central Hudson Gas & Elec Corp v Public Serv Comm of NY,* 447 US 557 (1988). The Supreme Court's description of the test in *Went for It* states:

> First, the government must assert a substantial interest in support of its regulation; second the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be narrowly drawn.

In applying this test, the United States Supreme Court discussed the second prong at length. In *Went for It*, the Court held that the findings of an extensive study conducted by the Florida state bar, which included both statistical and anecdotal data, were sufficient to satisfy the second prong of the *Central Hudson* test. The Court distinguished the facts in *Went for It* from the facts of another solicitation case (*Edenfield v Fane*, 507 US 761 [1993]), in which no evidence had been offered in support of the regulation, and which was struck down by the Supreme Court for that reason. The Court in *Went for It* (quoting *Edenfield*), explained that meeting the second prong "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."

During the Court's discussion relating to the bar's proposed amendment in this file, there was significant concern that adoption of the proposed amendment without a basis of support shown in more empirical terms may violate the second prong of the *Central Hudson* test. Members of the bar who submitted comments and spoke in support of the proposed amendment provided anecdotal references, but United States Supreme Court opinions do not clearly define the type and amount of evidence that would be sufficient to uphold the sort of regulation on commercial speech that is contained in the proposed amendment. To protect against potential challenges that might be raised if the Court adopted the proposed amendment, the Court invites the bar to conduct a study to gather empirical evidence in support of the proposed amendment. Upon completion of such a study, the Court will be happy to consider adoption of the proposed amendment.

Sincerely,



Robert P. Young, Jr.